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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1520

FRANK KIRKPATRICK,

Petitioner

v.

THE STATE OF WISCONSIN
(Department of Natural Resources),

Respondent

PETITIONER'S SUPPLEMENTAL BRIEF

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Respondent State in its "Question Presented for Review" concedes that the exclusionary rule announced by the Wisconsin Supreme Court in 1923 and reaffirmed in 1971 "prevents the introduction of evidence of the negotiated price paid by a condemnor for another parcel (or portion thereof) of real estate . . ." This rule

prohibits even a hearing before the trial judge as to whether the purchased land is in fact similar to the land being condemned, the market value of which is being determined by the jury, and as to whether the negotiated price of the purchased land in fact reflects any factors not present with respect to the fair market value to be determined by the jury for the condemned lands.

This Court will note that the reason given by the Wisconsin Supreme Court for the exclusionary rule is as follows:

> "However, with the recognition of such a rule [allowing a jury to consider the State's purchase price of lands alleged to be comparable to those being condemned], the subject could well have formed a stubborn issue upon which numerous witnesses could have been called by both parties, with distracting and unsatisfactory results. Such evidence, if admitted, in most cases would be remote, indirect and unsatisfactory. We cannot sanction such an improvident rule." Blick v. Ozaukee County (1923), 180 Wis. 45, at 48. (Underscoring supplied). [This quotation also appears on A. p. 21a].

This reason for this exclusionary rule is not a compelling one and completely ignores the fact that the State will already have in its files the data as to the comparability of the lands in question and appraisals reflecting the differing factors, if

any, which entered into the negotiated purchase price and which might affect the fair market value to be determined by the jury for the condemned lands. Submission of these fact issues preliminarily to the trial judge would take very little time, but such time as might be required for due process cannot properly be described as producing "unsatisfactory results".

The Wisconsin Supreme Court's justification for the exclusionary rule in the Blick case was again expressly repudiated by this Court in its decision handed down April 3, 1972 in Peter Stanley v. State of Illinois, ___ U. S. ___, 31 L. Ed. 2d 551, at 561-562, where this Court emphatically condemned such alleged inconvenience in the following manner:

> "Despite Bell and Carrington, it may be argued that unmarried fathers are so seldom fit that Illinois need not undergo the administrative inconvenience of inquiry in any case, including Stanley's. The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials

no less, and perhaps more, than mediocre ones.

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand." (Underscoring supplied)

The Wisconsin Attorney General quotes from 4 Nichols, Eminent Domain, Settlements, pp. 12-142-to 12-144, sec. 12.3113[2], but deletes the following sentence of Nichols, which negates the Respondent's position for which he cited Nichols, to-wit:

> "However, the mere fact that a corporation, which purchased land by voluntary sale, was invested with the power of eminent domain does not in and of itself show that the sale was a compulsory settlement rather than a fair transaction in the market."

This Court will note that the State at page 5 of its Brief in Opposition accepts Petitioner's statement that the Risney lands, like the Kirkpatrick lands, consisted of a portion of a tract of land held for subdivision and sale; that the por-

tion of the Risney lands not taken was, like the portion of the Kirkpatrick lands not taken, separated from a lake by a public highway; and that the price of $36,000 proposed by the State over the telephone was approved by Risney during that same telephone conversation. (See Petition, pp. 6-7). The price paid by the State for the Risney land, which had an obligation not to waste the taxpayers' money, when proffered by the condemnee is binding upon him and consequently goes to the very heart of the issue of fair market value of the lands being condemned. The State, of course, has its file on the Risney purchase and can with minimal diversion apprise the trial judge of the basis, if any existed, for holding the lands not comparable or the negotiated price as involving factors not present in the determination of the fair market value of Petitioner's lands, e.g., those listed in the Respondent's Brief as justification for the exclusionary rule. Deprivation of hearing by the trial judge as to these facts by the exclusionary rule of the Blick case manifestly violates the Fourteenth Amendment under the decisions of this Court and no compelling reason for it is even asserted by the Wisconsin Attorney General.

Furthermore, even in the Blick case the Wisconsin Supreme Court actually noted that the $1,000 paid for the property purchased by the State involved a $600 factor of consequential damages, which had not been shown to exist as to the land being condemned. (See Appendix C of the Petition, A. p. 21a). Hence the adoption of the exclusionary rule in the Blick case was wholly unnecessary to the reversal of the judgment in the trial court.

CONCLUSION

Since the factual statements as to the Risney land purchase by the State in the Petition for Writ of Certiorari are conceded by the respondent State, and the State does not challenge Petitioner's claim that the exclusionary rule of the Wisconsin Supreme Court denied him even a hearing on the facts as to the comparability of the Risney land and its purchase price to Petitioner's lands and its fair market value, this Court should (1) grant the requested Petition for Writ of Certiorari, (2) forthwith reverse the decision of the Wisconsin Supreme Court, and (3) direct that Petitioner be granted a new trial as to the market value of his lands taken by the State for Whitefish Bay State Park.

Respectfully submitted,

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